

**BEFORE THE
RESPIRATORY CARE BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA**

In the Matter of the Accusation Against:

JACOB IBARRA
1600 Saratoga Ave #403-243
San Jose, CA 95129

Case No.: R-2048

OAH No.: N2007060092

DECISION AND ORDER

The attached proposed Decision of the Administrative Law Judge is hereby adopted by the Respiratory Care Board of California, Department of Consumer Affairs, as its Decision in the above entitled matter.

This Decision shall become effective on October 2, 2007.

It is so ORDERED September 25, 2007.

Original signed by: _____

LARRY L. RENNER, BS, RRT, RCP, RPFT
PRESIDENT, RESPIRATORY CARE BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

BEFORE THE
RESPIRATORY CARE BOARD
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

JACOB IBARRA
San Jose, California

Respiratory Care Practitioner License No. 20564,

Respondent.

Case No. R-2048

OAH No. N2007060092

PROPOSED DECISION

Administrative Law Judge Melissa G. Crowell, State of California, Office of Administrative Hearings, heard this matter in Oakland, California, on August 2, 2007.

Catherine E. Santillan, Senior Legal Analyst, represented complainant Stephanie Nunez, Executive Officer of the Respiratory Care Board.

James E. Leininger, Attorney at Law, represented respondent Jacob Ibarra, who was present.

The matter was submitted on August 2, 2007.

SUMMARY

Complainant brought these proceedings to discipline respondent, a licensed respiratory care practitioner, for possessing marijuana. Marijuana was found in respondent's car, but it belonged to a friend of respondent's. Respondent does not use marijuana. Respondent was previously issued a public letter of reprimand by the board in 2003 following a 2002 conviction for driving under the influence of alcohol.

FACTUAL FINDINGS

1. Respondent Jacob Ibarra is licensed as a respiratory care practitioner by the Respiratory Care Board, Department of Consumer Affairs, State of California. The board issued Respiratory Care Practitioner License Number 20564 to respondent on December 24, 1998. The license will expire on February 29, 2008, unless renewed.

2. The accusation was amended at hearing in numerous places. The following lines were deleted in their entirety: lines 11 through 13 on page 2; lines 1 through 11 on page

3; and, lines 23 through 28 on page 4. On page 4, line 8, the heading, "Conviction of a substantially related crime;" was deleted. On page 4, lines 9 and 10, the citations to Business and Professions Code sections "3750(d) and 3752 [conviction]" as causes for discipline were deleted. On page 4, lines 10 and 11, the factual allegation, "in that he entered a plea of guilty to a violation of Vehicle Code section 23222(b), possession of marijuana, a misdemeanor" was deleted. On page 5, the citations to Business and Professions Code sections "3750(d) and 3752" as causes for discipline were deleted.

3. On November 4, 2005, respondent was driving his car in Campbell above the speed limit. He was pulled over by Campbell Police Officer F. Ramirez. Officer Ramirez smelled the odor of marijuana from the vehicle and asked respondent if he had any in the vehicle. Respondent said he did not. Respondent then admitted that he did have marijuana in the glove compartment. Officer Ramirez found a plastic baggie containing marijuana in a space behind the glove compartment. Subsequent tests revealed the baggie in respondent's vehicle contained 2.70 grams of marijuana. The officer also seized from the center consol a pipe used to smoke marijuana.

Respondent's Evidence

4. The marijuana found in respondent's car by Officer Ramirez did not belong to respondent; it belonged to a friend who had left it in respondent's vehicle.

Respondent drove three friends to an Oakland As' baseball game. Unbeknownst to respondent, one of them brought marijuana with him. Prior to the game, the friend(s), but not respondent, smoked some of the marijuana. The friend did not want the marijuana confiscated by As security and so, with respondent's permission, he left the marijuana in the glove box of respondent's car. After the game, respondent drove his friends, who were intoxicated, back to San Jose, and the marijuana was left in the glove compartment.

Respondent says he did not remember the marijuana until after he told Officer Ramirez that he did not have marijuana in his vehicle. Respondent says he did not smell marijuana in his vehicle.

5. Respondent says he agreed to be the designated driver to the As game because of his prior DUI. He did not drink before or during the game specifically because he did not want to put his license at risk again.

6. Respondent does not smoke marijuana.

7. Respondent has been employed as a respiratory care therapist with Good Samaritan Hospital for nine years. He currently works the night shift on a full-time schedule.

8. Brett Loosbrock has been respondent's direct supervisor for five years. Loosbrock has never seen respondent under the influence of any substance at work.

Respondent is a competent respiratory care therapist. In his last three evaluations respondent has received an overall rating of meeting expectations by Pulmonary Center Manager Jan Rowell.

9. Respondent and his wife are expecting their first child. Respondent's wife is a registered nurse. They drink alcohol occasionally, but they have not been drinking alcohol while she is pregnant. They both exercise regularly.

Prior Public Letter of Reprimand

10. Following a stipulated settlement and decision and order effective December 11, 2003, the board issued respondent a public letter of remand following his conviction in December 2002 of violating Vehicle Code section 23152, subdivision (a) (driving with a blood alcohol level of 0.08 percent or more). The discipline was imposed pursuant to Business and Professions Code section 3750, subdivision (d), section 3750.5, subdivision (b), and section 3752.

Costs

11. The board has incurred \$3,585 in costs for investigating and enforcing this matter.

LEGAL CONCLUSIONS

1. Pursuant to Business and Professions Code section 3750, subdivision (g), the board may discipline a licensee who has violated any provision of Division 2 (commencing with section 500) or any provision of Chapter 8.3 (pertaining to respiratory therapy) of the Business and Professions Code.

Pursuant to Business and Professions Code sections 3750.5, subdivision (a), the board may discipline a licensee who has obtained or possessed in violation of law any controlled substance as defined in Division 10 (commencing with section 11000) of the Health and Safety Code, or any dangerous drug as defined Article 2 (commencing with section 4015) of Chapter 9. Marijuana is a Schedule 1 controlled substance. (Health & Saf. Code, § 11054.)

By reason of the matters set forth in Factual Finding 3, the evidence established that respondent possessed marijuana in violation of law. Respondent may not have purchased the marijuana, but he permitted it to be left in his vehicle. Cause for license discipline exists under Business and Professions Code sections 3750.5, subdivision (a) (possession of a controlled substance), and 3750, subdivision (g) (violation of the act).

2. Under board guidelines, the minimum penalty for possession of a controlled substance is revocation stayed, and two years' probation. It is considered an aggravating circumstance that respondent has a prior discipline with the board. In this case, however, it is appropriate to deviate from the disciplinary guidelines.

While respondent possessed marijuana, the marijuana did not belong to him. It is true that he permitted his friend to leave the marijuana in his vehicle and it is true that respondent forgot about the drug which caused this predicament. In doing all of this, respondent exercised poor and immature judgment. All that being said, there is no evidence that respondent used this marijuana specifically or uses marijuana generally. There is no evidence that respondent has a substance abuse problem of any kind. There is no evidence to suggest that respondent has ever worked as a respiratory care therapist while under the influence of alcohol or drugs. For these reasons, his conduct does not warrant an order of probation. But in light of respondent's prior discipline, it is appropriate to issue a public letter of reprimand.

3. Business and Professions Code section 3753.5, subdivision (a), provides: "In any order issued in resolution of a disciplinary proceeding before the board, the board or the administrative law judge may direct any practitioner or applicant found to have committed a violation of violations of law to pay to the board a sum not to exceed the costs of the investigation and prosecution of the case." By reason of the matters set forth in Factual Finding 11, the board incurred \$3,585 in investigating and prosecuting this matter. In view of the substantial reduction of the charges and allegations against respondent at hearing, and the resulting reduced discipline, it is neither appropriate nor reasonable to pass all of the board's costs onto respondent. As stated by the California Supreme Court in *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, in addressing an analogous statutory cost provision, a board may not assess the full costs of investigation and prosecution when it has conducted a disproportionately large investigation to prove that a respondent engaged in relatively innocuous misconduct. (*Id.* at p. 45.) The board should exercise its discretion and reduce respondent's cost obligation to 50 percent of the board's costs, which is \$1,792.50.

ORDER

1. Respondent Jacob Ibarra, holder of Respiratory Care Practitioner License No. 20564, shall be publicly reprimanded by the Respiratory Care Board of California.

2. Respondent shall pay to the board costs of investigation and prosecution in the matter in the amount of \$1,792.50. The board may permit the amount to be paid in installments.

DATED: August 17, 2007



MELISSA G. CROWELL
Administrative Law Judge
Office of Administrative Hearings